Supreme Court, U.S.
FILED
DEC 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-346

In the Supreme Court of the United States

OCTOBER TERM, 1985

P. CHARLES SCHWENDER, PETITIONER

v.

DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

WILLIAM KANTER
HILLARY STERN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the proceedings leading to petitioner's discharge from the Occupational Safety and Health Administration were procedurally defective.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 4

Conclusion 8

TABLE OF AUTHORITIES

Cases:

Arnett v. *Kennedy*, 416 U.S. 134 ..... 5, 6

Camero v. *United States*, 375 F.2d 777 6

Cleveland Bd. of Educ. v. *Loudermill*, No. 83-1362 (Mar. 19, 1985) 7

DeSarno v. *Department of Commerce*, 761 F.2d 657 ..... 5, 6, 7

Depte v. *United States*, 715 F.2d 1481 6

Ryder v. *United States*, 585 F.2d 482 6

Sullivan v. *Department of the Navy*, 720 F.2d 1266 6

Taylor v. *Hayes*, 418 U.S. 488 5

Welcker v. *United States*, 752 F.2d 1577 6

Wisniewski v. *United States*, 353 U.S. 901 6

Page

Statute and regulations:

Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. II) 7501-7543 7

5 U.S.C. 7513(b)(1) 7

5 U.S.C. 7513(b)(2) 7

5 C.F.R. 752.404(a) 7

5 C.F.R. 752.404(b) 7

5 C.F.R. 752.404(c)(2) 3, 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A48-A49) is reported at 770 F.2d 178 (Table). The opinion of the Merit Systems Protection Board (Pet. App. A43-A46), the opinion of the New York Regional Office of the Merit Systems Protection Board (Pet. App. A24-A42), and the opinion of the Department of Labor deciding official (Pet. App. A5-A22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 29, 1985. On June 25, 1985, the Chief Justice extended the time to file a petition for a writ of certiorari to and including August 27, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner P. Charles Schwender is a former employee of the Occupational Safety and Health Administration (OSHA), where he held the position of Safety and Health Manager in the Albany, New York, area. On December 8-10, 1980, petitioner attended an OSHA Area Directors conference in New York City. After the conference ended, petitioner remained in New York City for two days for the purpose of sightseeing. On December 11, petitioner was spotted by OSHA Regional Administrator Roger Clark, one of petitioner's superiors. When petitioner returned to his office on December 15, he instructed the office timekeeper to record that he had not taken annual or sick leave on December 11, but had taken eight hours of sick leave on December 12. Petitioner's time card came to Clark's attention two weeks later. Remembering that he had seen petitioner in New York City on December 11, Clark went to Albany to investigate the matter. When Clark asked petitioner about the discrepancy, petitioner replied that he had been sightseeing in New York on December 11-12, that he should have taken annual leave for those days, and that he did not know why his time card was in error. However, petitioner's explanation was contradicted by other employees, including the timekeeper, who related petitioner's instructions as to how his time card should be filled out. Pet. App. A6-A12, A17-A18, A27-A30.

On February 11, 1981, Clark sent petitioner a formal notice proposing to remove him from his position with OSHA on the grounds that he had falsified his timecard, instructed a subordinate to prepare a false timecard, and made false statements to Clark regarding the timecard. Pet. App. A50-A54. The proposed notice advised petitioner of his right to make an oral and written reply to the charges. *Id.* at A52-A53. Clark was designated as the OSHA official who was to receive petitioner's oral reply, and John Miles,

an OSHA Field Coordinator and a supervisor of petitioner's, was designated as the deciding official. See 5 C.F.R. 752.404(c)(2). On March 23, petitioner submitted a 16-page written response to Clark's charges that contained a point-by-point denial of each charge, a procedural objection to the designation of Clark as the oral reply official, and the allegation that there had been "an apparent lack of investigation" of the case (Pet. App. A56). The following day, petitioner, accompanied by counsel, gave his oral reply to the charge before Clark. Petitioner's counsel also identified what he believed were errors or misunderstandings on Clark's part and articulated several bases for challenging Clark's credibility. Petitioner's reply was transcribed in full by a court reporter, and the transcript was later forwarded to the deciding official (*id.* at A77-A99).

Thereafter, the deciding official directed Clark to conduct a further investigation in order to clarify the record (Pet. App. A24, A106). Clark did so and later amended his notice of proposed adverse action (*id.* at A5, A24-A25, A102-A105). Petitioner then replied in writing to the amended notice (*id.* at A5, A27, A108-A124), and the deciding official issued his decision to remove petitioner effective August 3, 1981 (*id.* at A5-A22).

2. Petitioner appealed to the New York Office of the Merit Systems Protection Board (MSPB). After a hearing, the Board's presiding official found that the evidence supported the charges (Pet. App. A24-A42). In so ruling, the presiding official also rejected petitioner's contentions that he had been prejudiced by the designation of Clark as the oral reply official and by allegedly improper ex parte contacts between Clark and the deciding official (*id.* at A34-A37). The presiding official found no evidence showing that Clark was biased against petitioner or that petitioner had been denied a fair opportunity to present his case, particularly since Clark was merely the proposing, not

the deciding, official (*id.* at A35-A37). The presiding official also held that communications between proposing and deciding officials do not violate an employee's procedural rights (*id.* at A37).

The MSPB thereafter denied petitioner's request to review the presiding official's decision, ruling that the agency had complied with all relevant statutory and regulatory requirements, that the presiding official's findings were supported by the evidence, and that the penalty of removal was not excessive (Pet. App. A43-A46).

3. The court of appeals affirmed in an unpublished decision (Pet. App. A48-A49). The court held that "[s]ubstantial evidence supports the board's findings that the charges against petitioner were proved by a preponderance of the evidence" and that his "allegations of procedural error [are] without legal basis" (*id.* at A49).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court of petitioner's fact-bound claims is not warranted.

Petitioner argues (Pet. 6-10) that the designation of Clark as the official who was to receive petitioner's oral reply to the charges violated due process. Petitioner contends that Clark was biased, since he had initiated the adverse personnel action, and that Clark's bias denied petitioner the opportunity to defend against the charges of misconduct. However, the presiding official found that nothing in the record supported petitioner's contention that Clark was biased (Pet. App. A36), and both the full Board and the court of appeals declined to disturb that finding (*id.* at A43-A45, A49). Petitioner also has cited no specific evidence showing that Clark was biased. Instead, petitioner relies entirely on the fact that Clark had initiated the

proceedings against him. But a majority of the Court in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), held that due process was not violated where the supervisory official who had proposed an employee's removal also served as the decisionmaker. *Id.* at 155-156 n.21 (plurality opinion); *id.* at 170 n.5 (opinion of Powell, J.); see also, *e.g.*, *DeSarno* v. *Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985).[1] It necessarily follows that there is no procedural infirmity in allowing the proponent of an adverse personnel action to serve merely as the recipient of an employee's oral reply and to make a recommendation as to the appropriate final decision, where the final decision whether to discharge the employee rests in the hands of a different official.

In addition, petitioner filed written objections to both the initial and the amended notices of adverse personnel action, and he has not identified any defense that he was unable to present in those objections. A transcript of petitioner's oral reply was sent to the deciding official (Miles), which gave him an opportunity to evaluate petitioner's claim that Clark should not be believed. Finally, the presiding official's decision demonstrates that he carefully considered all of the evidence and conducted a full, independent, and impartial review of the charges. Petitioner's fact-bound claim lacks merit and warrants no further review.[2]

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[1]Justice White would have required the proponent of charges against an employee to be replaced as the initial decisionmaker only where "the hearing official was the object of slander that was the basis for the employee's proposed discharge" because, in that situation, "the hearing examiner's own reputation, as well as the efficiency of the service, [is] at stake" (416 U.S. at 199). The situation here is not remotely similar to that one.

[2]With one exception, every decision of this Court cited by petitioner (Pet. 9-10) to support his claim was also cited by Justice White in his separate opinion in *Arnett* (416 U.S. at 198). The only exception, *Taylor* v. *Hayes*, 418 U.S. 488 (1974), involved criminal contempt and did not purport to overrule *Arnett*.

Petitioner also claims (Pet. 10-16) that he was prejudiced by allegedly improper ex parte communications between Clark and the deciding official. However, communication between proposing and deciding officials is not prohibited in the absence of an express statute or regulation forbidding such conduct. *DeSarno* v. *Department of Commerce*, 761 F.2d at 659-661; *Welcker* v. *United States*, 752 F.2d 1577, 1582-1583 (Fed. Cir. 1985); *Depte* v. *United States*, 715 F.2d 1481, 1484 (Fed. Cir. 1983). No statute or regulation forbids such communications in this situation. On the contrary, the oral reply official must offer a recommendation to the deciding official; in fact, the same individual may serve as both the proposing and deciding official. See 5 C.F.R. 752.404(c)(2); *Arnett*, 416 U.S. at 155-156 n.21 (plurality opinion); *id.* at 170 n.5 (opinion of Powell, J.).[3] Petitioner's claim of prejudice also lacks any foundation in the record. Petitioner has not identified any information that Clark allegedly conveyed to the deciding official that was not known to petitioner beforehand; rather, petitioner's claim appears to rest entirely (Pet. 12) on Clark's inability to recall whether he had informed the deciding official of facts alleged by petitioner to support his defense to the charges. But these facts had already been presented to the deciding

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[3]Petitioner erroneously asserts (Pet. 13-15) that the court of appeals' decision in this case conflicts with its earlier rulings in *Sullivan* v. *Department of the Navy*, 720 F.2d 1266 (Fed. Cir. 1983); *Ryder* v. *United States*, 585 F.2d 482 (Ct. Cl. 1978); and *Camero* v. *United States*, 375 F.2d 777 (Ct. Cl. 1967). The court of appeals has explained that *Camero* and *Ryder* both involved trial-type adversarial proceedings provided by agency regulations that have no counterpart here (see *DeSarno*, 761 F.2d at 661; *Welcker*, 752 F.2d at 1582-1583), and in *Sullivan* "the whole structure of th[e] employee-removal system precluded such communications" (*Welcker*, 752 F.2d at 1583 n.3). In any event, any alleged intracircuit conflict is for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

official in petitioner's two written responses (Pet. App. A55-A76, A108-A124), and petitioner does not claim that the deciding official failed to consider his defenses.

Finally, petitioner maintains (Pet. 16-19) that this case provides a suitable vehicle for the Court to set forth definite procedures for a pretermination hearing for public employees. To the extent that petitioner's argument rests on the premise that the procedures followed in his case were defective, that claim must fail for the reasons given above. *Cleveland Bd. of Educ.* v. *Loudermill*, No. 83-1362 (Mar. 19, 1985), also does not support petitioner's argument. *Loudermill* explained that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Slip op. 12. Petitioner clearly received everything that is required by *Loudermill* and more. Petitioner was twice given written notice explaining the charges against him in detail (Pet. App. A50-A54, A102-A105; see 5 U.S.C. 7513(b)(1); 5 C.F.R. 752.404(a) and (b)), and he was given the opportunity to respond both orally and in writing to each set of charges (Pet. App. A54, A105; see 5 U.S.C. 7513(b)(2); 5 C.F.R. 752.404(a) and (b)). Nothing in *Loudermill* suggests that due process requires more than the Civil Service Reform Act of 1978, 5 U.S.C. (& Supp. II) 7501-7543, or its implementing regulations provide. See *DeSarno*, 761 F.2d at 660.

In sum, four separate reviewing authorities have found that petitioner's dismissal was justified. His fact-bound arguments deserve no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

WILLIAM KANTER
HILLARY STERN
Attorneys

DECEMBER 1985

DOJ-1985-12